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No. 07-1607

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In the
Supreme Court of the United States

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SHELL OIL COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

♦

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

♦

BRIEF *AMICUS CURIAE* OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER SHELL OIL COMPANY

♦

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae International Association of Defense Counsel ("IADC" or "*amicus*") is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the fair and efficient administration of civil justice and consistently seeks to improve the civil justice system. *Amicus* supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

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SUMMARY OF ARGUMENT

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (2006), sets out a statutory scheme providing for the remediation of hazardous waste sites. CERCLA allows the federal government and states to recover the clean up costs incurred for this remediation from specified parties – including

[1] This brief was authored by *amicus* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amicus* has the consent of the parties to file this brief. Letters indicating their consent are being submitted with this brief.

those who arranged for the disposal or treatment of hazardous materials at the site. *See* 42 U.S.C. § 9607(a).

The government's authority to recover clean up costs from "arrangers" is not boundless, however. Congress chose to impose "arranger" liability only on a specific group: those who arrange for the disposal or treatment of *waste*. Not every material qualifies as "waste" and, notably, useful products do not fit within the statutory definition. The distinction between waste and useful products is critical, allowing manufacturers to sell innumerable useful products without fear of potentially devastating CERCLA liability.

In this case, the Ninth Circuit disregarded CERCLA's waste requirement, holding petitioner Shell Oil Company ("Shell") liable as an "arranger" for selling a new, useful agricultural product. Left undisturbed, the Ninth Circuit's overly expansive "arranger" liability standard could expose countless manufacturers to the enormous costs of cleaning up others' property pursuant to CERCLA even though these manufacturers did not engage in the disposal of waste when they made and sold new, useful products. The Ninth Circuit's improper expansion of "arranger" liability in direct contravention of CERCLA's plain language threatens to discourage the manufacture and sale of new, useful chemicals as well as many other beneficial products containing hazardous substances.

This Court should adhere to CERCLA's waste requirement for "arranger" liability and hold that manufacturers and sellers of new, useful products cannot be liable as "arrangers" because such useful products are not waste. Accordingly, this Court should reverse the Ninth Circuit's decision holding Shell liable as an "arranger" for manufacturing and selling a new, useful product.

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ARGUMENT

THE COURT SHOULD HOLD THAT THOSE WHO SELL NEW, USEFUL PRODUCTS ARE NOT SUBJECT TO "ARRANGER" LIABILITY UNDER CERCLA.

A. CERCLA imposes "arranger" liability only on those who arrange for the disposal or treatment of waste.

1. Under CERCLA's plain language, "arranger" liability applies exclusively to parties who arrange for the disposal or treatment of waste.

In 1980, Congress enacted CERCLA "to provide for the clean up of hazardous waste from polluted sites throughout the United States." *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 773 (4th Cir. 1998). Under CERCLA, parties who are "potentially responsible for hazardous-waste contamination may be forced" to help pay

for the clean up costs of a hazardous waste site. *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998).

CERCLA does not automatically assign liability to every person with an attenuated connection to a hazardous waste site. *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000); *see S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409 (11th Cir. 1996) ("CERCLA liability . . . is not boundless."). Rather, clean up costs may be recovered only from four statutorily-enumerated classes of potentially responsible parties (PRPs). *See* 42 U.S.C. § 9607(a); *Canadyne-Georgia Corp. v. NationsBank, N.A.*, 183 F.3d 1269, 1273 (11th Cir. 1999) ("CERCLA subjects only 'covered persons' to liability. There are only four classes of potentially responsible parties. . . .").

One of the four classes of PRPs liable for clean up costs are "arrangers," whom section 107(a)(3) of CERCLA ("section 107(a)(3)") defines as:

> [A]ny person who by contract, agreement, or otherwise arranged *for disposal or treatment*, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .

42 U.S.C. § 9607(a)(3) (emphasis added). Thus, "arranger" liability exclusively applies to parties who

"arranged for [a] 'disposal or treatment. . . .'" *A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998).

CERCLA borrows its definition of "disposal" and "treatment" from "section 1004 of the Solid Waste Disposal Act" ("SWDA") (codified, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA"), at 42 U.S.C. § 6903 (2006)).[2] 42 U.S.C. § 9601(29). That SWDA provision defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any *solid waste* or *hazardous waste* into or on any land . . . so that [it] may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *Id.* § 6903(3) (emphases added). Similarly, "treatment" refers to "any method, technique, or process . . . designed to change the physical, chemical, or biological character or composition of any *hazardous waste* so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume." *Id.* § 6903(34) (emphasis added). A "disposal" or "treatment" therefore occurs only when a party engages in the disposal or treatment of *waste*. *Id.* §§ 6903(3), (34), 9601(29); *see* Ian Erickson, Comment, *Reconciling the CERCLA Useful Product and Recycling Defenses*, 80 N.C. L. Rev. 605, 612

[2] Courts use the terms SWDA and RCRA interchangeably. *Courtaulds Aerospace, Inc. v. Huffman*, 826 F. Supp. 345, 349 n.4 (E.D. Cal. 1993).

(2002) ("CERCLA's definition of 'disposal[]' [is] incorporated from the RCRA . . . [which] requires the disposal of a 'waste'. . . .").

The Second, Fourth, Sixth, and Seventh Circuits, as well as the Ninth Circuit in other cases, have all held that the "disposal or treatment" requirement for "arranger" liability may only be satisfied by the disposal or treatment of waste. *See Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 508 F.3d 930, 934 (9th Cir. 2007) ("A person may be held liable as an 'arranger' . . . only if the material in question constitutes 'waste'. . . ."); *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999) ("Because the definition of 'disposal' refers to 'waste,' only transactions that involve 'waste' constitute arrangements for disposal within the meaning of CERCLA."); *Pneumo Abex Corp.*, 142 F.3d at 774 (SWDA's "definition of 'treatment' presupposes discard. . . . [A]s the legislature chose to use the SWDA definition of treatment [in CERCLA], and the presupposition inherent in the definition, it is not the role of this court to substitute another definition."); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (Posner, J.) ("The words 'arranged with a transporter for transport for disposal or treatment' appear to contemplate a case in which a person or institution that wants to get rid of its *hazardous wastes* hires a transportation company to carry them to a disposal site." (emphasis added)); *AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 998 & n.9 (6th Cir. 1993) ("'Disposal' . . . is deemed to take place only at the point at which

there is a threat that *hazardous wastes* will be emitted into the environment, air, soil, or groundwater." (emphasis added)).

2. A minority of district courts have erroneously held that parties who sell any hazardous substance, even if the material is not waste, can be liable as "arrangers." Their decisions contravene CERCLA's plain language and legislative history.

Notwithstanding the plain language of CERCLA and the SWDA, a small minority of district courts have held that those who sell hazardous substances can be liable as "arrangers" even where those substances are not waste. These district courts incorrectly reason that section 107(a)(3) of CERCLA applies to those who make arrangements involving "'hazardous *substances*,'" not necessarily *waste*.[3] *United States v. Farber*, 1988 WL 25427, at *3-*5 (D.N.J. Mar.

[3] In this case, the Ninth Circuit did not expressly reject the waste requirement, as did these earlier district court decisions. Rather, as we explain below, the Ninth Circuit disregarded CERCLA's waste requirement by holding Shell liable as an "arranger" for manufacturing and selling a new, useful product, *see* Pet. App. 4a-5a, 44a-46a, 83a-87a, even though such a product does not fit the statutory definition of waste. Aside from its decision here, the Ninth Circuit has long recognized that only parties who arrange for the disposal or treatment of *waste*, not those who sell useful products, are subject to "arranger" liability. *Alco Pac., Inc.*, 508 F.3d at 934-37 (collecting Ninth Circuit cases).

16, 1988) (quoting 42 U.S.C. § 9607(a)(3)); *see also United States v. Summit Equip. & Supplies, Inc.*, 805 F. Supp. 1422, 1431-32 (N.D. Ohio 1992); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 237-41 (W.D. Mo. 1985), *overruled on other grounds by United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 741 (8th Cir. 1986);[4] *cf. CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc.*, 769 F. Supp. 432, 436-38 (D.N.H. 1991) (construing "disposal" requirement for *all* PRPs "to include the disposal of all hazardous substances" and not only waste).

These district courts' interpretation of CERCLA's "disposal or treatment" requirement flouts a cardinal rule of statutory construction. Courts "must give effect, if possible, to every word of [a] statute." *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983). Under section 107(a)(3), "arranger" liability attaches only to those who arrange for a "disposal" or "treatment," 42 U.S.C. § 9607(a)(3), and CERCLA expressly defines these terms with reference to the SWDA, *id.* § 6903(3), (34). "Congress could have defined 'disposal' [and 'treatment'] any way it chose; it chose to import the meaning provided in [the] SWDA. That

[4] *Accord Cal. ex rel. State Dep't of Toxic Substances v. Summer del Caribe, Inc.*, 821 F. Supp. 574, 579-80 (N.D. Cal. 1993); *Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Verticare Inc.*, 1993 WL 245544, at *9 (N.D. Cal. Mar. 1, 1993). These cases were both decided by California district courts before the Ninth Circuit expressly announced that "arranger" liability applies only where a party arranges for the disposal or treatment of waste.

meaning is clear." *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1362 (9th Cir. 1990).

This Court should decline to give effect to the phrase "hazardous substances" at the expense of the terms "disposal" and "treatment." This Court can give effect to *all* of the statute's terms by holding that parties are liable as arrangers under CERCLA only where they arrange for the disposal or treatment of *waste* containing hazardous substances. *See* Roger K. Ferland & Marilyn D. Cage, *Using RCRA to Interpret CERCLA Liability: What is "Arranging for Disposal"?*, 23 Ariz. St. L.J. 445, 477-79 (1991).

This approach complies with the "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted). By construing section 107(a)(3) consistently with CERCLA's provision defining the terms "disposal" and "treatment," 42 U.S.C. § 9601(29), this Court would simply recognize that CERCLA as a whole generally deals with hazardous substances only "at the point when they are about to, or have become, wastes," *3550 Stevens Creek Assocs.*, 915 F.3d at 1362.

Some of the foregoing district courts also mistakenly maintain that CERCLA's legislative history supports the imposition of "arranger" liability on parties who arranged for disposal or treatment regardless whether the hazardous substance involved constitutes waste. *Summer del Caribe, Inc.*, 821

F. Supp. at 579-80; *see Verticare Inc.*, 1993 WL 245544, at *9-*10; *Farber*, 1988 WL 25427, at *4. CERCLA's legislative history, however, is widely considered to be of little value in determining Congress's intent in enacting the statute. *See United States v. CDMG Realty Co.*, 96 F.3d 706, 713 n.2 (3d Cir. 1996); *see also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989). That CERCLA's legislative history does not offer clear guidance is unsurprising since "the bill that ultimately became [CERCLA] was an eleventh-hour compromise hastily assembled" and enacted "with only days remaining in a lame-duck [Congressional] session." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 885 n.13 (9th Cir. 2001). CERCLA's legislative history thus "furnishes at best a sparse and unreliable guide to the statute's meaning." *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988).

Nonetheless, to the extent CERCLA's legislative history provides guidance, that history demonstrates Congress meant to impose "arranger" liability only on parties who arrange for the disposal or treatment of waste. Congress enacted CERCLA "to fill gaps left" in RCRA. *Amoco Oil Co.*, 889 F.2d at 667. RCRA overhauled the SWDA by "establishing a prospective scheme regulating the management and disposal of hazardous wastes," Gregory A. Robins, Note, Catellus Development Corp. v. United States: *A "Solid" Approach to CERCLA "Arranger" Liability, or a "Waste" of Natural Resources?*, 47 Hastings L.J. 189, 192

(1995), but RCRA "left inactive sites largely unmonitored by the [Environmental Protection Agency] unless they posed an imminent hazard," *Amoco Oil Co.*, 889 F.2d at 667. Congress therefore enacted CERCLA "to 'establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites' . . . [and] to shift the costs of cleanup" to those responsible for hazardous waste contamination. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007) (quoting H.R. Rep. No. 96-1016(I), at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125); *see Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005); *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1437 (7th Cir. 1988).[5]

[5] The House Report discussed in these cases addressed H.R. 7020. H.R. Rep. No. 96-1016(I), at 1, *reprinted in* 1980 U.S.S.C.A.N. at 61119. Congress enacted CERCLA by passing "a substitute bill . . . as an amendment to H.R. 7020." *Exxon Corp. v. Hunt*, 475 U.S. 355, 365 n.8 (1986). The final bill itself "was the product of [a] last-minute compromise between" H.R. 7020 and two competing Congressional bills, "and carries virtually no direct legislative history." *United States v. Mottolo*, 605 F. Supp. 898, 905 (D.N.H. 1985).

B. The Ninth Circuit erred in subjecting Shell to "arranger" liability because parties who manufacture and sell new, useful products are not arranging for the disposal of "waste" and thus cannot be held liable for clean up costs under CERCLA.

1. The useful product doctrine distinguishes between wastes and useful products and thereby protects those who manufacture and sell new, useful products from "arranger" liability.

CERCLA does not directly define which materials qualify as "waste." CERCLA, however, borrows its definition of "hazardous waste" from the SWDA, 42 U.S.C. § 9601(29), thereby demonstrating that Congress meant for courts applying CERCLA to rely on the SWDA to determine when a substance is waste.[6]

The SWDA defines waste in pertinent part as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material. . . ." 42

[6] Congress's intention to incorporate the SWDA's definition for waste into CERCLA is further confirmed by the fact that CERCLA also borrows the definitions of "disposal" and "treatment" from the SWDA and, as already discussed, the waste requirement for "arranger" liability arises from those definitions. *See Alco Pac., Inc.*, 508 F.3d at 934; *see also* Jeffrey M. Gaba, *Interpreting Section 107(a)(3) of CERCLA: When Has a Person "Arranged for Disposal?"*, 44 Sw. L.J. 1313, 1327 (1991).

U.S.C. § 6903(27).[7] By thus defining waste as those substances that have been cast aside because they are deemed to be useless or worthless, *see, e.g.*, *United States v. Wedzeb Enters., Inc.*, 844 F. Supp. 1328, 1335-36 (S.D. Ind. 1994) ("'[g]arbage' is a 'refuse of any kind'" and "'refuse' is 'the worthless or useless part of something'"), the SWDA signals that covered wastes are only those materials parties seek to get rid of because they are no longer useful or have no value, *see Douglas County, Neb. v. Gould, Inc.*, 871 F. Supp. 1242, 1245-47 (D. Neb. 1994) (disposal of waste occurs where a party "merely get[s] rid of a product which has no use" but not where a party sells "a new useful product"); *Wedzeb Enters., Inc.*, 844 F. Supp. at 1335-36 ("it is the worthlessness of an object that makes it 'refuse' or 'garbage'" under CERCLA's waste standard).

Accordingly, five federal appellate courts (including the Ninth Circuit in earlier cases) have held that, because "arranger" liability attaches only to parties who arranged for the disposal or treatment of waste, those who sell a useful product are not "arrangers." *Freeman*, 189 F.3d at 161-62, 164; *A & W Smelter & Refiners, Inc.*, 146 F.3d at 1112; *Pneumo Abex Corp.*, 142 F.3d at 774-76; *Amcast Indus. Corp.*, 2 F.3d at

[7] The SWDA offers definitions for both "hazardous waste" and "solid waste." 42 U.S.C. § 6903(5), (27). Under the SWDA, however, a "hazardous waste" is simply a subset of "solid waste." *Id.* § 6903(5).

751; *AM Int'l, Inc.*, 982 F.2d at 999.[8] Courts refer to this distinction between useful products and waste "as the useful product doctrine.'" *Alco Pac., Inc.*, 508 F.3d at 934.[9]

On occasion, courts disagree about the parameters of the useful product doctrine. For example,

[8] Even federal appellate courts that have not expressly decided whether "arranger" liability applies solely where there is a disposal or treatment of waste recognize that those who sell useful products are not arrangers. *See Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 683-84 (3d Cir. 2003); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317-18 (11th Cir. 1990); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989). As the Fifth Circuit has explained, "there is no possible reasonable interpretation of the term 'disposal' that could encompass the commercial sale" of useful products. *Dayton Indep. Sch. Dist.*, 906 F.2d at 1065.

[9] Certain courts mistakenly refer to the useful product doctrine as a defense. *See, e.g., Gould Inc. v. A & M Battery & Tire Serv.*, 933 F. Supp. 431, 436 (M.D. Pa. 1996). That characterization is inaccurate because it implies a defendant bears the burden of asserting and proving the useful product doctrine to avoid "arranger" liability. In reality, the doctrine is simply a shorthand method for invoking CERCLA's waste requirement. *See Alco Pac., Inc.*, 508 F.3d at 934. Since "arranger" liability does not exist unless the "material in question constitutes 'waste,'" *id.*, the party attempting to impose "arranger" liability bears the burden of proving at the outset that the material at issue constitutes waste, *cf.* Tommy T. Henson II, *What a Long, Strange Trip It's Been: Broader Arranger Liability in the Ninth Circuit and Rethinking the Useful Product Doctrine*, 38 Envtl. L. 941, 955 (2008) ("The [useful product] doctrine is really a principle to which the courts must adhere, rather than an excuse to be asserted in defense of a claim.").

courts disagree about whether materials must be sold solely for use in conformance with their original intended purpose before they can be considered a useful product. *See RSR Corp. v. Avanti Dev., Inc.*, 68 F. Supp. 2d 1037, 1044-45 (S.D. Ind. 1999) ("[T]here is some disagreement among the courts about what constitutes usefulness. A few courts narrow the application of the useful product defense only to those products which may still be used for their originally-intended purpose. . . . However, the majority of courts refer to the useful product defense without reference to original use. . . . [T]hese courts" examine whether a transaction sought to discard a material "or to sell valuable materials (not necessarily still fit for their original use).").

But despite these disagreements over the doctrine's outer limits, courts agree that the sale of *new* products for use in their original state unquestionably does not involve an arrangement for the disposal of waste. *See, e.g., Freeman*, 189 F.3d at 164-65 (sale of "virgin" chemicals for use in their unadulterated form did not amount to an arrangement for the disposal of waste); *Dayton Indep. Sch. Dist.*, 906 F.2d at 1061, 1064-66 (no "arranger" liability attaches for merely manufacturing and selling new asbestos-containing building materials for use by the construction industry); *Douglas County, Neb.*, 871 F. Supp. at 1247 ("CERCLA liability will not attach if a transaction involves the sale of a new useful product. . . ."); *see also* Henson, *supra*, at 955 (no court has found the manufacturer of a new product designed for use in its

current state liable for contamination arising solely from the disposal of the product by its purchaser). These new products are "almost inevitably useful products" by nature, Henson, *supra*, at 949-50, because they are created for a specific purpose and thus derive value from and may be used in their present form, *id.* at 955.[10]

The useful product doctrine plays a critical role when parties seek to recover clean up costs from alleged "arrangers" because CERCLA's "disposal" requirement calls for a three-part inquiry. The threshold question for whether a "disposal" occurred is whether the *material* at issue is waste rather than a useful product. *See Alco Pac., Inc.*, 508 F.3d at 934 (a party cannot be liable as an "arranger" unless the material at issue is waste); *A & W Smelter & Refiners, Inc.*, 146 F.3d at 1112 (same); *see also* Erickson, *supra*, at 612 ("[W]hether a defendant transferred a 'waste' is an important *first step* in determining whether a defendant made an arrangement for 'disposal.'" (emphasis added)). Therefore, unless the material at issue is waste, the second inquiry – whether the *activity* involving that waste falls within the SWDA's statutory definition of "disposal" – is

[10] For these reasons – and because manufacturers of these new products "plac[e] a beneficial material into the market" – even commentators who contend the waste requirement should be eliminated from the CERCLA analysis recognize that CERCLA liability should not apply to the manufacturer and seller of a new product manufactured for use in its original state. Henson, *supra*, at 949-50, 967-71.

irrelevant. *See* 42 U.S.C. § 6903(3) (defining "disposal" exclusively as certain activities involving "solid waste or hazardous waste"); *see also Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152, 1175 (S.D. Cal. 2006) ("[T]here are at least two components to a CERCLA 'disposal.' [First], the hazardous substance must be *waste*.").[11]

[11] The third inquiry mandated by CERCLA's "disposal" requirement is whether the party *intended* to arrange for the disposal of waste. *See United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231-32 (6th Cir. 1996) (CERCLA's plain language requires an intent to arrange for a disposal); *Amcast Indus. Corp.*, 2 F.3d at 751 (same). This "intent" inquiry can overlap with the "waste" inquiry where a particular material's character as waste or a useful product is unclear (for example, where a party sells used products for reprocessing or salvage). In such cases, courts often examine a party's intent to determine if the party sold the material to discard it or, conversely, because the material was useful and valuable. *Pneumo Abex Corp.*, 142 F.3d at 774-75. Examining a seller's intent to determine whether the substance is waste typically also determines whether the seller intended to arrange for a disposal. *Amicus* notes, however, that this Court need not reach the intent question because it can reverse based solely on the fact that Shell's new, useful product cannot be considered waste. *A & W Smelter & Refiners, Inc.*, 146 F.3d at 1112 (useful product is not waste); *see also* Henson, *supra*, at 949-50, 955 (new products manufactured for use in their original form are inherently useful and valuable).

2. The Ninth Circuit's overly expansive "arranger" liability standard in this case disregards CERCLA's waste requirement.

In this case, the Ninth Circuit disregarded CERCLA's waste requirement by subjecting Shell to arranger liability for manufacturing and selling a new, useful product. The court held Shell liable as an "arranger" here where Shell manufactured an agricultural soil fumigant designed to protect crops and then sold this new product to Brown & Bryant, Inc. (B & B), so that B & B could either sell the product to local farmers or apply the fumigant to farmland for them. *See* Pet. App. 4a-5a, 44a-46a, 83a-87a. The Ninth Circuit so held even though the district court expressly found Shell's fumigant was not waste and despite the fact that the Ninth Circuit agreed the fumigant was a useful product. Pet. App. 45a-46a, 85a-86a.

A majority of the Ninth Circuit panel held Shell liable as an "arranger" on the theory that B & B employees leaked small amounts of the fumigant at B & B's facility while transferring it from common carrier trucks that Shell hired to deliver the new fumigant. *See* Pet. App. 5a-6a, 86a-87a, 116a-119a, 255a-257a. The majority's decision reasoned that "arranger" liability should apply because the SWDA defines "disposal" to include "leaking" and, according to the majority, Shell's sale of its useful product "necessarily and immediately result[ed] in the leakage" of the product. Pet. App. 44a-46a; *see* Pet. App. 85a. The Ninth Circuit thus implied that Shell's new,

useful product became waste simply by virtue of being inadvertently leaked before it could be used for its original intended purpose.[12] *See* Pet. App. 5a-6a, 45a-46a.

In so holding, the Ninth Circuit effectively disregarded CERCLA's waste inquiry. The Ninth Circuit's flawed analysis ignores the plain language of the SWDA's definition of "disposal," which, as we explained earlier, first requires a court to examine whether the substance at issue is *waste* and only then asks whether the activity involving the waste qualifies as a "disposal." *See* 42 U.S.C. § 6903(3).

This Court should decline to endorse the Ninth Circuit's flawed and overly expansive test for "arranger" liability. As Judge Posner has explained, nothing in CERCLA compels the extraordinary conclusion that those who sell and ship useful products should be held strictly liable as arrangers when mishaps involving their products occur as a result of another party's actions. *Amcast Indus. Corp.*, 2 F.3d at 747-48, 751. Simply stated, "Congress did not intend CERCLA to target legitimate manufacturers or sellers of useful products." *Dayton Indep. Sch. Dist.*, 906 F.2d at 1065.

[12] The Ninth Circuit maintained that Shell "knew that some leakage was likely" during the transfer process, Pet. App. 5a, 46a, but nothing in the court's opinion indicates Shell, the common carrier, or B & B actually meant for the fumigant to leak before it could be used.

The Ninth Circuit's evident approach of determining a new product's usefulness, and hence its character as waste, with reference to mishaps that might occur would gut the distinction between waste and useful products and would potentially expose all manufacturers and sellers of new products containing hazardous substances to CERCLA "arranger" liability. Common sense dictates that there is *always* some chance – given the potential for human error – that a new product may leak or spill. But since Congress chose to impose "arranger" liability exclusively on those who arrange for the disposal or treatment of waste, this Court should decline to hold manufacturers of new, useful products liable for cleaning up another's property solely because small amounts of those products were inadvertently leaked or spilled on the property before they could be used. As Judge Bea pointed out when he – joined by seven other circuit judges – dissented from the Ninth Circuit's denial of rehearing *en banc* here, the Ninth Circuit's "arranger" standard in this case "stretches the meaning of arranger liability beyond any cognizable limit." *See* Pet. App. 52a, 71a.[13]

[13] A majority of the Ninth Circuit panel also applied an expansive "arranger" standard because the majority thought Shell enjoyed sufficient control over the transfer process to be considered an "arranger." *See* Pet. App. 47a-49a. This court need not address whether ownership or control is necessary to establish "arranger" liability and, if control suffices, what degree of control must be shown. Questions of ownership and control need not be resolved until the threshold questions concerning

(Continued on following page)

C. Expanding "arranger" liability to manufacturers who sell useful products will have severe and far-reaching ramifications.

Left undisturbed, the negative consequences of the Ninth Circuit's adoption of a standard imposing "arranger" liability on manufacturers for selling useful products will be far-reaching. Innumerable businesses manufacture and sell useful products containing hazardous substances. In fact, many common products contain these substances. Lemons contain citric acid, a hazardous substance. *A & W Smelter & Refiners, Inc.*, 146 F.3d at 1110. Firearm ammunition often contains lead, *Otay Land Co.*, 440 F. Supp. 2d at 1160; *see Kamb v. U.S. Coast Guard*, 869 F. Supp. 793, 795, 798 (N.D. Cal. 1994), as do automobiles (the lead is located in the battery), *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 384 (7th Cir. 1995). "Lead in any amount is a hazardous substance." *Otay Land Co.*, 440 F. Supp. 2d at 1160. Hundreds of thousands of buildings throughout the United States, if not more, were built with asbestos-containing materials, yet another hazardous substance. *G.J. Leasing Co.*, 54 F.3d at 384; *see Dayton Indep. Sch. Dist.*, 906 F.3d at 1061, 1065.

Moreover, it is commonly understood that many business operations require products containing

the material's character and the intent of the alleged PRP are addressed. Ownership and control tell a court nothing about whether the material at issue in a case is, by its nature, a waste or useful product.

hazardous substances. Dry cleaners, for example, regularly use a solvent that is a hazardous substance to help them clean clothes. *See United States v. Lyon*, 2007 WL 4374167, at *1 (E.D. Cal. Dec. 14, 2007); *Differential Dev.-1994, Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 730-31 (S.D. Tex. 2007). Poultry farms raise chickens, turkeys, and other poultry for sale to consumers as food with the aid of litter that contains a hazardous substance. *See City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1271-73, 1283-85 (N.D. Okla. 2003) (vacated following settlement).

Indeed, it cannot be gainsaid that hazardous substances are pervasive throughout our society. Absent the distinction between wastes and useful products, those who have manufactured and sold automobiles, ammunition, building materials, and dry cleaning solvent, to name a few examples, could be liable as "arrangers" under CERCLA. *See G.J. Leasing Co.*, 54 F.3d at 384 (absent this distinction, anyone who sells an automobile could be liable as an arranger); *Dayton Indep. Sch. Dist.*, 906 F.2d at 1065 (refusing to impose "arranger" liability on those who sold new asbestos-containing building materials precisely because they were "new useful and marketable product[s]"); *Lyon*, 2007 WL 4374167, at *1-*2, *4-*5 (applying the Ninth Circuit's decision here to indicate circumstances may exist where a manufacturer can be held liable as an "arranger" for selling newly-manufactured solvent used in dry cleaning operations); *cf. Kamb*, 869 F. Supp. at 798-99 (holding

the federal government and the State of California, among others, liable as "arrangers" because their personnel discharged firearms containing lead bullets at a shooting range). As these examples confirm, eliminating the distinction between waste and useful products would lead to "preposterous results." *G.J. Leasing Co.*, 54 F.3d at 384 (Posner, J.).

The financial consequences of exposing countless businesses to "arranger" liability for manufacturing and selling useful products would be staggering. The Environmental Protection Agency ("EPA") estimates that, on average, 294,000 hazardous waste sites "will need to be cleaned up" at a total cost of $209 billion over the next 30 to 35 years, and reports that most of these costs will be borne by PRPs. U.S. EPA, Cleaning Up the Nation's Waste Sites: Markets and Technology Trends, at viii (Sept. 2004), *available at* http://www.clu-in.org/download/market/2004market.pdf ("EPA Report"). Some commentators estimate that the average cost to clean up a hazardous waste site ranges "between $25 million and $50 million." Michael L. Italiano et al., *Environmental Due Diligence During Mergers and Acquisitions*, 10 Nat. Resources & Env't 17, 17 (1996). The cost to clean up some sites may run far higher. *See, e.g.*, Press Release, U.S. Dep't of Justice, W.R. Grace to Pay for Cleanup of Asbestos Contamination in Libby, Montana (Mar. 11, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/March/08_enrd_194.html (announcing supplier of chemicals would pay $250 million for clean up costs at a site in Montana); Cindy Skrzycki, *GE Ads Zap the EPA Over*

PCB Cleanup, Wash. Post, July 24, 2001, at E1 (cost to clean up the Hudson River estimated to be $460 million); *see also* Michael Carter, *Successor Liability Under CERCLA: It's Time to Fully Embrace State Law*, 156 U. Pa. L. Rev. 767, 774 (2008) ("the average cost of remedial action" at larger sites is $140 million).

Given the crushing cost of CERCLA clean up liability, determining "[w]ho bears the burden for hazardous waste cleanup costs is an issue of great consequence." *Centerior Serv. Co. v. ACME Scrap & Iron Metal Corp.*, 153 F.3d 344, 349 n.9 (6th Cir. 1998), *abrogated on other grounds as recognized by ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 457-58 (6th Cir. 2007).[14] Placing that immense burden on those who manufacture and sell useful products would result in a significant, detrimental and unintended impact on our nation's economy.

[14] In this case, the Ninth Circuit expressed concern over the possibility that ordinary taxpayers will unfairly bear the burden of clean up costs. *See* Pet. App. 26a. The court's fear is misplaced. The EPA reports that PRPs will pay for most clean up costs. *See* EPA Report, *supra*, at viii. Moreover, it is not the taxpayers *per se* who fund clean ups when solvent PRPs cannot be located. Rather, Congress's 1986 amendments to CERCLA create a Superfund that funds clean up activities. *See* 26 U.S.C. § 9507 (2007); 42 U.S.C. §§ 9604-9605. This Superfund is financed by a combination of appropriations, industry taxes, and judgments obtained in legal actions to recover response costs. *See* 26 U.S.C. § 9507(b).

According to the Census Bureau, there are 288,568 manufacturing firms in this country. U.S. Census Bureau, 2005 Statistics of U.S. Businesses – U.S., sectors, http://www2.census.gov/csd/susb/2005/uslrg05.xls (last visited Nov. 19, 2008). The National Institute of Standards and Technology (NIST) provides a higher estimate, maintaining that small to mid-size manufacturers number more than 350,000, make up about 99 percent of our nation's manufacturers, "account for more than half of the total value of U.S. production[,] and employ nearly 12 million people." NIST, Hollings Manufacturing Extension Partnership, http://www.nist.gov/public_affairs/guide/mep.htm (last visited Nov. 19, 2008).[15] As these statistics underscore, manufacturers "are a cornerstone of the American economy." U.S. Dep't of Commerce, Manufacturing in America: A Comprehensive Strategy to Address the Challenge to U.S. Manufacturers, at 7 (Jan. 2004), *available at* http://www.commerce.gov/opa/press/Secretary_Evans/2004_Releases/Manufacturing%20Report/DOC_MFG_Report_Complete.pdf. The Ninth Circuit's decision in this case threatens to sweep these manufacturers "into the web of arranger liability." Henson, *supra*, at 954. The Ninth Circuit's overly broad "arranger" liability standard is thus "beyond

[15] NIST is the federal agency within the United States Department of Commerce whose "mission is to promote U.S. innovation and industrial competitiveness. . . ." NIST, General Information, http://www.nist.gov/public_affairs/general2.htm (last visited Nov. 19, 2008).

the reasonable bounds of CERCLA and discourages the sale of useful products. . . ." *Id.* at 955.

♦

CONCLUSION

The Ninth Circuit's excessively expansive "arranger" liability standard exposes manufacturers to the enormous costs of CERCLA liability for doing nothing more than making and selling new, useful products. *Amicus* urges this Court to reverse the Ninth Circuit's decision and acknowledge what the governing statutory language makes plain: manufacturers cannot be held liable as "arrangers" under CERCLA for selling new, useful products.

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